IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.1667 OF 2005

IN

FIRST APPEAL NO. 1600 of 1996

Bhairoba Devasthan Pashan Public
Trust and Ors ... Applicants

V/s

Muslim Mamat Mulani
Kabarasthan Pashan and Ors. .. Respondents

Shriram S. Kulkarni for Applicants

CORAM:S.R.SATHE,J.

DATED:9th March 2006

P.C.:-

. The applicants, original appellants have filed this application for restoration of First Appeal No.1600 of 1996 which was dismissed for non supplying paper book within stipulated period.

2. Brief facts giving rise to this application are as under :

. A suit for damages, declaration and injunction was filed by Respondents against the present applicants in the District court, Pune. The said suit was decreed in

favour of the Respondents on 29-4-1992.

3. Being aggrieved by the said order the applicants filed First Appeal No.1600 of 1996. The said appeal was admitted by this Court. Thereafter on 31-8-2001 this Court (Coram:V.C.Daga,J) passed order directing the applicants to remove all office objections within 15 days and further directed that on failing which the appeal shall stand dismissed without reference to the Court. As the applicants did not remove the office objections viz. failed to supply paper book, in view of the order 31-8-2001 the appeal came to be dismissed.

4. It is the case of the applicants that the learned Advocate appearing on behalf of the applicants in First Appeal had informed the applicants for taking steps for removing office objections by sending telegram. However, unfortunately for want of communication and knowledge the order dated 31-8-2001 could not be complied. It is applicant’s case that they were not aware about the conditional order passed by the Court and they were all along under the impression that the appeal is pending in the High Court. However, on 11-2-2005 the Respondents gave one public notice in the newspaper regarding sale of the suit property. The applicants, therefore, made enquiry and they came to know about the order dated 31-8-2001 and consequential dismissal of the first appeal. Hence the applicants filed the present application on 5-4-2005 and prayed

that First Appeal be restored and the delay caused in filing the present application be condoned.

5. On behalf of the Respondent no.1 the sole trustee of the trust Shaikh Kasam filed affidavit in reply and opposed the application. He contended that besides telegram there are several other modes of communications and the applicant could have informed about the order by other modes. Though it is alleged that telegram was sent to the applicant there is nothing on record to show that such telegram was actually sent. According to the Respondents there was absolutely no sufficient reason for the applicants for not filing the application in time and there was negligence on the part of the applicants in filing the application. The Respondents also contended that both the trusts are involved in long litigation since 1960 and there is no justifiable reason to revive the first appeal when there is delay of 3 years and 7 months in filing the restoration application.

6. I have heard both the learned Advocates. The only point which falls for my consideration is whether the applicants have shown sufficient cause for not filing the application for restoration in time or whether they have given satisfactory explanation about the delay caused. It is true that in the instant case the delay is quite long i.e. of about 3 years and 7 months. However as observed by the Apex Court in Balakrishhnan

V/s M.Krishnamurthy **AIR (1998) 7 SCC 123** merely because there is long delay the application for condonation of delay filed under Section 5 of the Limitation Act cannot be rejected. Acceptability of explanation for the delay is the sole criterion while deciding the said application.

7. The learned Advocate for the applicant submitted that while considering the application under Section 5 of the Limitation Act the approach of the Courts should be liberal. For this proposition he has placed reliance on a case Collector, Land Acquisition, Anantnag and another V/s Mst. Katiji and ors. **AIR 1987 SC 1353** therein the Apex Court has mentioned that for the following reasons the approach is required to be liberal. The reasons are :

1. Ordinarily a litigant does not stand to benefit by lodging an appellate;

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. Every day’s delay must be explained" does not mean that a pedantic approach should be made. Why

not every hour's delay, every second's day? The doctrine must be applied in a rational common sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in justice being done because of a non deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

8. So keeping in mind the above principles of law laid down by the Apex Court we have to scan the material on record and find out whether this is a fit case where delay can be condoned.

9. At the outset it must be mentioned that when suit was decided against the present applicants they

preferred first appeal. Not only that but the same was also admitted. So, this itself indicates that the applicants had genuine desire to challenge the finding of the lower Court and to have decision on merits. It does appear that applicants fail to file paper book in stipulated period and as a result of the same by virtue of conditional order that was passed the appeal stood dismissed. It seems that it is the case of the applicants that the learned Advocate for the applicants who had appeared in the first appeal had informed the applicants about the steps to be taken. However, according to the applicants for lack of communication and knowledge they did not take any steps. In the application itself the applicants have averred that the advocate for the applicants sent telegram. However, it is not specifically mentioned as to whether the said telegram was sent after passing of the conditional order or before that. The applicants have produced during the course of argument one Xerox copy of receipt issued by the Post Office to show that one telegram was sent.however, the said receipt is absolutely of no use because it does not indicate as to who had sent the telegram and to whom it was sent. Moreover the date appearing on the said telegraph receipt is 16-8-2001. So, it was prior to passing of the conditional order. However, merely because the telegram does not help to the applicant, we cannot jump to the conclusion that this is not a fit case to condone the delay.

10. It must be noted that the applicant no.1 is a public trust. On behalf of the said trust one Kokate has filed affidavit in rejoinder and has stated that during the relevant period management of the trust was changed and because of communication gap and knowledge the conditional order passed by the Hon'ble Court could not be complied with. There is no reason to disbelieve this submission. It must be noted that though Respondents have filed the affidavit in reply, they have nowhere contended that applicants did not file the paper book deliberately with a view to prolong the matter or with a view to gain any undue advantage and cause damage and inconvenience to the Respondent. When such is the position normally it must be presumed that party who has filed the appeal and the same is already admitted would not take necessary steps so as to prosecute the said cause further. There is another piece of evidence which also in fact indicates that the applicants were vigilant and they had an intention to proceed with the appeal. It has come on record that it is only after the time the Respondents issued public notice for sale of suit property the applicants immediately made query and at that time they came to know about dismissal of the first appeal. So, it indicates that the applicants had all along an intention to assert their right in respect of the suit property and wanted to get decision regarding the same on merits. So, I am inclined to accept the explanation given by the applicants that there was communication gap and they had no knowledge about the

conditional order and they received information about dismissal only after the issue of public notice. Incidently, it must be noted that in similar circumstances, in a case of Kalipada Das @ Mahanto and Ors V/s Bimal Krishna Sen Gupta (Dead) by LRs **(1983) 1 SCC 14** the appellant tenants during pendency of their appeal before the High Court twice failed to comply with the order of the High Court to supply copies of paper books to it within a fixed period. Thereupon High Court dismissed the appeal on the ground of non compliance of its order. The Supreme Court by its interim order allowed further time for filling those copies and while doing so it was observed that filing of paper book is a procedural step and it is in aid of justice and is not substantive justice itself. Therefore, penalty on failure to comply with the court's order providing a procedural step must be commensurate with or proportionate to the gravity of the lapse or omission. So, in the instant case also we find that there was some lacuna on the part of the applicants to comply the procedural aspect of the first appeal but for that they should not be required to suffer, or on that count should not be deprived of from having decision of the matter on merits. So, having regard to all the facts and circumstances and position of law I am of the opinion that it is necessary to condone the delay. Of course, while doing so we have to bear in mind that the Respondent no.1 is also a trust. Because of the default of the applicants the Respondent no.1 trust should not

be required to suffer and put to inconvenience. So it is necessary to grant some cost to the Respondent trust.

11. Hence I pass the following order :

. Delay in filing the present Civil Application is condoned. The Applicants to pay cost of Rs.3,000/- (rupees three thousand) to the Respondent no.1 Trust. Cost to be deposited in this Court within 10 days from today. On payment of cost the First Appeal No.1600 of 1996 be restored to its original number. Thereafter the applicants to remove the office objections, if any, within 8 days and the matter be placed for final hearing in due course.

. Costs if deposited, Respondent no.1 is allowed to withdraw the same.

. At this stage the learned Advocate for the Respondents in this case submits that she may be permitted to file Cross Objection. She is permitted to file Cross Objections.

. C.A. disposed of in the above terms.

(S.R.SATHE,J.)